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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 183

THE ASSOCIATED PRESS,

Petitioner,

v.

TAFT-INGALLS CORPORATION, formerly known as The Cincinnati Times-Star Company, an Ohio corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDICES

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May 26, 1965

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, The Associated Press, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered January 18, 1965. The judgment sought to be reviewed reversed the judgment of the United States District Court for the Southern District of Ohio, Western Division, which awarded damages to petitioner against respondent, and remanded the case with instructions to dismiss the complaint.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 340 F. 2d 753. The opinion of the United States District Court is unreported. The opinions of the Court of Appeals and the District Court are annexed hereto as Appendix A and Appendix B, respectively (*infra*, pages 1a, 60a).

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was dated and entered on January 18, 1965. The judgment is annexed hereto as Appendix C (*infra*, page 70a). Petitioner's timely petition for rehearing en banc was denied on February 25, 1965, and its timely petition for rehearing was denied on February 27, 1965. The orders denying rehearing en banc, and rehearing, are annexed hereto as Appendix D and Appendix E, respectively (*infra*, pages 72a, 73a). On application of respondent, Mr. Justice Stewart, on April 7, 1965, ordered that the time for filing a petition for writ of certiorari in this case be extended to and including May 28, 1965.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. May the Cincinnati Times-Star ("Times-Star"), a newspaper-member of The Associated Press ("AP"), which desired and voluntarily entered into a contract with AP for a leased wire news service, which was transmitted over three wires, and which continued to receive this service without protest for nine years, thereafter defend an action for breach of such contract on the ground that the contract constituted an illegal tie-in arrangement in violation of the antitrust laws?

2. Where AP furnishes its basic news service to its metropolitan newspaper members over three wires, three wires being required by metropolitan newspapers because of the increased volume of news, where each of the wires when necessary or convenient is used interchangeably with the others, and where costs of news gathering and its dis-

semination are not allocable among the three wires on any realistic basis, does an assessment of AP members for this service as a unit constitute an illegal tie-in violating the antitrust laws?

3. Was the finding of the District Court that there was insufficient evidence upon which to find that the news transmitted over one particular facility was a separate and distinct service from the news transmitted over another facility clearly erroneous so as to permit the Court of Appeals not only to set the finding aside but to make its own contrary finding of fact?

STATUTES INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended 50 Stat. 693, 69 Stat. 282; 15 U. S. C., Sections 1 and 2; and Sections 3 and 4 of the Clayton Act, 38 Stat. 731; 15 U. S. C., Sections 14 and 15. The texts of these statutes are set out as Appendix F (*infra*, pages 74a-76a).

STATEMENT OF THE CASE

AP is a mutual, co-operative membership corporation organized in New York in 1900 to gather with economy and efficiency an accurate and impartial report of the news. The purposes for which AP was organized are to gather, by its own instrumentalities, by exchange with its members and by other appropriate means, all kinds of information for the use and benefit of its members, consisting of approximately 1,750 newspapers, and approximately 2,200 radio and television stations (R. 61a; P. Ex. 6, R. 395a-397a).*

*The citation "R a" refers to pages in the Appendix for Defendant-Appellant (Respondent) in the Court of Appeals (Volume III of the Certified Record); the citation "R b" refers to pages in the Appendix for Plaintiff-Appellee (Petitioner) in the Court of Appeals (Volume IV of the Certified Record).

Times-Star became a charter member of AP when the latter was founded (R. 421a). It continued as a member until 1958, when it sold its principal assets to another Cincinnati publisher (P. Ex. 7, R. 424a). In August 1948 it entered into a contract with AP for AP's news service and, among other things, agreed that the contract should continue until termination upon two years' notice (P. Ex. 4, R. 390a-393a).

When, in July 1958, without giving the requisite notice, Times-Star purported to terminate the agreement, AP filed its Complaint on September 15, 1958, against Times-Star for breach of contract, and its Amended Complaint on January 29, 1959 (R. 5a, 12a). Jurisdiction of the District Court was invoked on grounds of diversity of citizenship, the amount in controversy exceeding $10,000. Times-Star's Second Amended Answer and Counterclaim alleged, among other things, that the contract was invalid for the reason that it embodied a tying agreement illegal under 15 U. S. C., Sections 1, 2 and 14 (R. 15a, 16a-17a).

Prior to 1900, newspapers in the United States did not have adequate access to national and international news. No single newspaper had resources or facilities to gather such news in sufficient quantities to publish a complete newspaper (D. Ex. 57-B, R. 548a). To satisfy this need petitioner, AP, was formed as a non-profit membership corporation in 1900 by newspaper proprietors, including a representative of Times-Star (P. Ex. 6, R. 393a-396a, 398a-399a; P. Ex. 7, R. 421a). Each member is obligated to furnish news within its area to AP and AP acts as a medium for the exchange of such news among its members. In addition, AP, through its own instrumentalities, gathers news for its members (P. Ex. 4, R. 390a; P. Ex. 6, R. 395a-397a).

Prior to 1935, the volume of news collected and transmitted by AP to its metropolitan member-newspapers was

such that it could be sent over facilities which came to be known as the A and B wires* (R. 161a-162a). The A circuit connected directly with metropolitan member-newspapers throughout the United States. The B wire, which carried news beyond the capacity of the A wire to handle promptly, connected the approximately 100 news bureaus of the AP in the United States. These bureaus, in turn, were able to forward news coming over the B wire to member-newspapers on a regional or local wire which became known in Ohio as the S wire or the Ohio Big Cities wire (R. 153a, 161a, 180a-183a, 185a, 79b-81b).

By 1935 the volume of news had increased to such an extent that an additional transmission facility, known as the D wire, was added with the consent of all members, including Times-Star, and was used principally for the transmission of business and financial news (R. 161a-162a; P. Ex. 7, R. 422a). Commencing about 1935, therefore, the basic service of AP provided for transmission of news to the Times-Star and other metropolitan newspapers east of Kansas City and north of the Mason-Dixon line by way of the A, D and regional or S circuits (R. 81a-82a, 214a, 215a).

These additional wires were not added so as to permit a segregation of types of news. They were added because the growing volume of news could not be handled by one circuit (R. 161a-162a). Plainly, they were not added to enable AP to tie one service to another, for its members had theretofore been receiving the same news over a single wire. If the capacity of a single circuit could be sufficiently en-

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*The term "wire" in relation to AP's news service came into usage in the early years when messages were transmitted over telegraph wires (R. 164a). Today, the "wire" is not an actual physical wire but an electronic channel or wireless beam (R. 181a, 80b).

larged, AP could, and perhaps would, return to a one circuit operation.

Subsequent to 1935, news transmitted to the Times-Star and other metropolitan newspapers over the A circuit was principally general and of common interest and importance to the members (P. Ex. 7, R. 421a-422a; R. 179a). News transmitted over the D circuit was principally of a business and financial character, and news transmitted over the S or Ohio Big Cities circuit was principally of a local or regional character (P. Ex. 7, R. 422a). However, the use of a particular wire or circuit did not determine the character of the news. News of any kind was transmitted over any available circuit when circumstances warranted.

For example, the D wire is used for general news when the A wire cannot at the moment accommodate such news (R. 180a, 186a, 261a-262a, 79b, 99b, 108b, 110b-111b, 135b). Important financial news is carried by the A wire, for instance, the story of a stock split by AT&T (R. 187a, 261a, 343a-344a, 98b-99b). The S wire is used not only for news originating in Ohio, but for news originating elsewhere (R. 180a, 185a, 99b-100b, 79b-80b, 135b). Thus news coming over the B wire to AP's Columbus bureau is shifted to the S wire for further transmission to Cincinnati and other Ohio metropolitan cities (R. 180a-183a, 79b-80b). Sunday features are sent over any available wire (R. 110b).

News originating in Ohio might go over the S or A wire, or sometimes both (R. 100b-101b, 185a-186a). The Sheppard trial in Cleveland, for example, was carried to members over the A wire (R. 100b-101b). A presidential speech in Cleveland would undoubtedly be carried on the A wire and, in condensed form, on the S wire (R. 100b-101b). Stories from abroad are transmitted at various times over the A, D and S wires (R. 135b). In summary, which news is to be transmitted over which facilities is determined from

hour to hour by the volume and importance of the news moving at a particular time.

The testimony concerning a presidential speech in Cleveland demonstrates not only the interchangeable character of news wires, but also shows that news in general cannot be labeled as "national" or "regional" or "local". The same news can, and often does, partake of all three characteristics.

Relevant to the question of whether the three circuits constitute a single, indivisible service is the method by which AP's newspaper members are charged for the service, and the problem of whether costs could be fairly allocated among the three wires. Since its inception, AP has financed the cost of its operations by assessments upon member-newspapers. Assessments are calculated on the basis of the population served by each newspaper (R. 65a-66a, 195a, 89b; 118b; D. Ex. 35, R. 467a-468a). Times-Star retained as an expert Mr. R. Kirk Batzer, of the accounting firm of Lybrand, Ross Bros. & Montgomery. Mr. Batzer probed the assessment formula in detail and conceded that it was a fair method of assessment (R. 339a). Although Mr. Batzer was retained to devise a formula to break down assessment costs as to each of the three wire services, his report stated that ". . . . we feel that neither the charges or so-called elements themselves which make up the basic assessment nor any particular analysis thereof can be used to determine the separate wire cost" (D. Ex. 54, R. 526a-527a; R. 342a-343a).

An example taken from Judge O'Sullivan's dissenting opinion well illustrates not only the cost problem involved but also the inseparable character of news. As Judge O'Sullivan stated (*infra,* pages 37a-38a):

> "AP's man in Cairo, Egypt gets information that a prominent Cincinnatian is killed in Cairo, together

> with other Cairo news of worldwide interest; he sends this bundle of news to the AP bureau in New York, and from there it goes to the AP bureau at Columbus on the B wire; the chief there picks off the item of the death of the Cincinnatian and sends it to Cincinnati on the Ohio wire. I pose the question, when does this news become a separate and distinct commodity? At Cairo, Egypt? Or was it converted to singularity at Columbus, Ohio? If so, should a charge for the service be limited to some portion of the salary of the AP man at Columbus and the cost of the electronic channel between Columbus and Cincinnati? But who then is to pay for the services of the people who gathered and sent out the news from Cairo, and who is to pay for its handling in New York and how will these costs be apportioned? How will Cincinnati be separately assessed for a part of Cairo's costs for the rare day on which an event in Egypt has some special interest in Cincinnati?"

None of the four judges below who heard the case appeared to believe that Times-Star had shown any fair basis for allocating costs among the various wires. Judges Phillips and Edwards, constituting a majority in the Court of Appeals, said, however, that Times-Star's tie-in defense should not be nullified by unavailability of cost records (*infra,* pages 24a-25a). Judge O'Sullivan, on the other hand, in his dissenting opinion in the Court of Appeals, took the view that inability fairly to apportion costs goes to the heart of the separability issue (*infra,* page 44a; see also, District Court Opinion, *infra,* pages 66a-67a). An attempt to charge separately for a segment of AP's basic news service transmitted over the A, D and S facilities could result in serious inequities among its members (R. 343a-344a, 21b-23b).

Since AP is a membership corporation, there is no seller seeking, in an arm's length transaction, to compel an unwilling buyer to purchase unwanted merchandise. The seller is not a stranger to the user but the creature of the user. Under the By-laws, the regular members, of which Times-Star was one, are vested with power to elect the directors of AP and to recommend or ratify any amendment of the By-laws (P. Ex. 6, R. 404a-406a, 417a). If the members want news transmitted or paid for in a different manner, they have the power to accomplish their purpose.

For many years prior to August 1948, Times-Star had been receiving AP's basic news service, transmitted over the A, D and S wires (R. 162a-163a, 27b). On August 4, 1948, Times-Star and AP entered into the standard membership contract upon which this suit was brought by petitioner. Under the contract, AP agreed to furnish to Times-Star its "leased wire news service" (consisting of the same basic news service, transmitted over the A, D and S wires, which Times-Star had previously received), and Times-Star agreed to pay its assessment as fixed from time to time by AP's Board of Directors. The parties also agreed that the contract should continue until terminated by Times-Star upon two years' notice. Under the contract, if Times-Star transferred its business, the two-year notice requirement would become effective unless Times-Star caused its successor to agree to fulfill the contract and apply for membership in AP (P. Ex. 4, R. 390a-392a; R. 27b).

There is not even a suggestion in the record below that Times-Star, when it executed the August 1948 contract, requested anything less than the basic news service which, for years, had been furnished to it and similarly situated metropolitan newspaper-members. There is no evidence that Times-Star at that time inquired whether a lesser

service could be supplied. Indeed, this was conceded at the trial. When the District Court commented that ". . . there was absolutely no evidence whatever that there was—that it [the contract] was entered into under a complaint", Times-Star's counsel replied, "We don't have to show that, I want that understood, that is basic" (R. 112b).

During the interim between August 1948 and September 1957, Times-Star's conduct unequivocally confirmed its counsel's concession that the August 1948 contract was entered into without protest and that, indeed, Times-Star received under the contract exactly what it wanted. For example, David S. Ingalls, who became President and Publisher of Times-Star in 1954, testified that it was then the judgment of management that Times-Star needed the AP services (R. 42b, 113a). Neither he nor Rosemond, Times-Star's assistant publisher, considered requesting AP to reduce its assessment or in the alternative its basic service until 1957 (R. 111a, 278a, 110b-111b). In fact, Times-Star's first letter on the subject to AP, in August 1957, did not seek a lesser service but merely inquired whether its assessment could be reduced (D. Ex. 13, R. 451a).

When, in September 1957, nine years after the contract had been entered into, Times-Star for the first time inquired whether it would be possible for AP to deliver only the S wire, AP replied in the negative (R. 280a-281a, 286a). Even then, Times-Star did not request AP to discontinue its basic service, or give notice that it intended to do so (R. 286a). Nor did Times-Star ask AP's Board of Directors to consider a change in the basic assessment for members. Rather, it continued to accept the service and pay for it until July 26, 1958. At about that time, without any prior notice, it purported to cancel the August 1948 agreement (R. 64a, 110a, 286a; P. Ex. 5, R. 393a; P. Ex. 7, R. 424a).

As of July 19, 1958, publication of Times-Star had been discontinued and the paper had been sold to the owner of its afternoon competitor, E. W. Scripps Company, publisher of The Cincinnati Post (P. Ex. 5, R. 393a; P. Ex. 7, R. 424a), and an affiliate of United Press International (R. 255a).

AP thereafter brought this action to recover the amount of Times-Star's assessment for the two year period for which it was obligated under the contract. Times-Star's primary defense was that the contract was unenforceable because AP's refusal in 1957 to furnish only one of the three transmission facilities constituting its basic service amounted to a tie-in illegal under the Sherman Act sufficient to invalidate the 1948 contract.

The District Court (Hon. Frank J. Battisti), finding that Times-Star had failed to prove an illegal tie-in, rendered judgment in favor of AP in the sum of $158,703.43, with interest from July 26, 1958 (*infra,* page 69a). The Court of Appeals, finding, erroneously we submit, an illegal tie-in between the parties to the action, reversed the District Court's judgment in awarding damages to AP, but affirmed the action of the District Court in dismissing Times-Star's antitrust counterclaim, on the ground that the evidence of damages was too speculative to support a recovery (*infra,* page 34a).

Judge O'Sullivan, who dissented in the Court of Appeals, stated, among other things, that "I find it difficult to understand how a contract without taint when made can be converted to complete illegality during its term by a request for total or partial release from its valid obligations", that ". . . the intricacies and complexities involved may make it impossible to offer any evidence for reliably dividing into separate and distinct products or articles the incorporeal thing called news", and that ". . . the obvious

difficulty and perhaps impossibility of making any such cost division that would be reliable is, I believe, relevant to and supportive of the District Judge's finding of fact that appellant [Times-Star] failed to prove its case of separability and distinctness" (*infra,* pages 51a, 44a).

The majority of the Court of Appeals appears to have relied to a large extent on four circumstances in finding that the Ohio Big Cities wire was separable from the A and D wires.

One circumstance was AP's treatment of a so-called Kentucky wire. After Times-Star was sold to the Scripps Cincinnati paper, Scripps inquired whether its paper could subscribe to only the A wire. AP replied that the basic service included the A, D and S circuits and that they were not severable. However, it advised Scripps that the Kentucky service could be eliminated at a reduction of $240.60 weekly (D. Ex. 41, R. 497a).

This circumstance lends no support to the Court of Appeals which inferred therefrom that if the Kentucky wire was severable, the S wire should also be severable (*infra,* pages 18a-19a). In drawing the inference, the Court of Appeals ignored the fact that Times-Star had held a second AP membership in the name of The Kentucky Times-Star, a Covington, Kentucky, newspaper, and in August 1948 had signed a separate contract for the Kentucky service for its Kentucky newspaper (P. Ex. 15, R. 169b; P. Ex. 4, R. 390a-392a; P. Ex. 17, R. 171b-173b; R. 111a, 288a, 155b; *infra,* pages 46a-47a). Thus the Times-Star had two memberships and two contracts with AP. One was for the Times-Star, Cincinnati, the other was for the Kentucky Times-Star. In 1956 AP had advised Times-Star that it could not cancel the Kentucky wire without violating its contract (D. Ex. 45-B, R. 510a). However, in 1958, after the change of ownership, the Scripps Cin-

cinnati paper in response to its inquiry was told, in effect, that it need not subscribe to two memberships if it did not so desire.

Plainly, Times-Star had not been paying the $240.60 as a price for the Kentucky wire based on any costs severed from the assessment it paid as a Cincinnati newspaper for the basic A, D and S news service. Rather, it had paid the money as a second proportionate assessment based on population for the leased wire news service supplied to it for its Covington newspaper and to similarly situated Kentucky newspapers (P. Ex. 17, R. 171b-173b; D. Ex. 35, R. 475a, 488a, R. 111a, 288a).

A second circumstance relied on by the Court of Appeals majority was the fact that AP offered its sports service separately, at a separate charge (*infra*, page 19a). From this the majority inferred that the S wire was also severable. But Times-Star entered nothing in the record to meet its burden of establishing that the sports wire and the S wire were comparable, and that AP did not maintain a special staff of reporters whose sole duty was to cover sports events, so that a separate and fair cost for the sports service was relatively simple to establish. With respect to the basic A, D and S wire service, on the other hand, newsmen must be posted throughout the world, ready to gather spontaneous news of any character, whether of national, regional or local interest. A realistic allocation of costs among those wires would be impossible.

A third circumstance deemed significant by the majority was its observation that although A and D wire news spilled over on the S wire, there was no evidence that Ohio regional news spilled over on the A and D wires (*infra*, page 20a). Even if significant, which is most doubtful, the observation is contrary to testimony of both AP and Times-Star personnel (R. 185a-186a, 100b-101b, 103b).

Fourth, the majority inferred that since UPI charges separately for its news services, AP could do the same (*infra*, page 22a). As Judge O'Sullivan, dissenting, pointed out, the evidence on this subject is quite unclear (*infra*, page 38a). In any event, there is no similarity between UPI, a profit making corporation, which, if it so desired, could charge separately for separate wire services whether or not each charge is based on a fair allocation of costs among its facilities, and AP, a non-profit membership corporation, whose interest is not to make a profit, but to treat all its members fairly and without discrimination. AP cannot permit one of its members to pay less than a proportionate assessment for a segment of its basic service, when the result would be to shoulder its remaining members with a higher and disproportionate assessment.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals in the Instant Case Is Directly in Conflict with the Decisions of This Court in *United States* v. *Paramount Pictures*, 334 U. S. 131, and *Automatic Radio Co.* v. *Hazeltine*, 339 U. S. 827, and with the Decision of the Court of Appeals for the Tenth Circuit in *McCullough Tool Company* v. *Well Surveys, Inc.*, 343 F. 2d 381 (1965), and Probably Is in Conflict with the Decision of This Court in *United States* v. *Loew's Inc.*, 371 U. S. 38.

So far as we know, it has never been held, except by the Court of Appeals below, that an illegal tie-in can exist between a seller and a buyer where the latter, at the time he executed the contract, wanted precisely the package of products which he bought. On the contrary, illegal tie-ins, by definition, assume that a seller, using the economic power inherent in the demand for one of its products, requires as

a condition to the purchase of such product that the buyer also purchase a second distinct product which the buyer does not want.

Thus, in *United States* v. *Paramount Pictures,* 334 U. S. 131, this Court held that motion picture distributors' practice of offering for license one feature picture on condition that the exhibitor will also license another feature was an illegal tie-in. Mr. Justice Douglas, however, speaking for the Court, was careful to point out that the Court did not suggest that films may not be sold in blocks or groups, and to add, "All we hold to be illegal is a *refusal** to license one or more copyrights unless another copyright is accepted" (at p. 159).

In *Automatic Radio Co.* v. *Hazeltine,* 339 U. S. 827, this Court, in deciding that Hazeltine's patent licensing practices did not involve an illegal tie-in, pointed out that there was nothing in the record to support the averment that ". . . Hazeltine *refused** to grant a license under any one or more of its patents to anyone who *refused** to take a license under all" (at p. 831).

In *McCullough Tool Company* v. *Well Surveys, Inc.,* 10 Cir., 343 F. 2d 381 (1965); it was charged that Well Surveys misused its patents by conditioning its licensing agreements upon the aeceptance of a license under all of its patents in violation of the "package" or "block-booking" rules. The Court of Appeals for the Tenth Circuit, in holding that there was no patent misuse on this ground, stated (p. 408):

> "However, in order to constitute a misuse, there must be an element of coercion, such as where there has been a *request** by a prospective licensee for a license under less than all of the patents and a *refusal** by the licensor to grant such a license. Auto-

*Emphasis supplied.

matic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U. S. 827, 70 S. Ct. 894, 94 L. Ed. 1312."

In *United States* v. *Loew's, Incorporated,* S. D. N. Y., 189 F. Supp. 373, 380-1, 394 (1960), *aff'd on merits, remanded for further consideration of decree,* 371 U. S. 38, it was held that motion picture distributors' practice of compelling television stations, desiring particular feature films, to buy blocks of these films, was an illegal tie-in arrangement. Judge Dawson, however, in answer to a Government contention that contracts executed by a defendant film distributor with Storer Television Stations were block-booked, observed (p. 394):

> "Mr. Storer testified that he had never *requested** splitting or making substitutions in the 'Big 50' [block of films] in any market. Clearly none of the contracts was individually block booked."

Judge Dawson's ruling, so far as Storer was concerned, apparently was not the subject of review by this Court. However, this Court, after finding ample other evidence of illegal block-booking, went on to discuss the nature of the decree. It held that the Government properly requested a modification of the decree so as to require the defendants initially to price the films individually and to offer them on a picture-by-picture basis. As Mr. Justice Goldberg said, this was a necessary addition to the decree "in view of the evidence appearing in the record" (p. 53). In other words, there is nothing wrong with offering to sell in a package, in the absence of a request for less. However, where the record shows, in a Government suit, ample evidence of illegal tie-ins, the Government is entitled to effective relief and, as this Court stated, ". . . otherwise permis-

*Emphasis supplied.

sible practices connected with the acts found to be illegal must sometimes be enjoined" (p. 53).

Plainly, therefore, an illegal tie-in cannot exist as between a willing buyer and a willing seller. We know of no authority, other than the decision of the Court of Appeals below, permitting a party to a contract, voluntarily entered into on its part, to escape the consequences of its breach because later, and before the contract was validly terminated, it changed its mind and decided that it no longer wanted to pay for what it had voluntarily agreed to take. There is no evidence that Times-Star at the time it entered into the August 1948 contract requested or desired a lesser service. Indeed, respondent's counsel insisted that Times-Star did not have to show that it made any complaint or protest at the time it entered into the contract (R. 112b). Moreover, as we have shown, respondent's conduct for nine years after entering into the 1948 contract demonstrated that it wanted exactly what it had agreed to take (*supra*, page 10).

The decision of the Court of Appeals below, therefore, is directly contrary to the decisions of this Court and of the Court of Appeals for the Tenth Circuit.

2. The Decision of the Court of Appeals in the Instant Case Is Directly in Conflict with the Decision of This Court in *Kelly* v. *Kosuga*, 358 U. S. 516.

The decision below is erroneous even if it be assumed *arguendo* that AP's policy or practice requires metropolitan members to subscribe to a basic service consisting of not less than three wires, and that such a practice would be illegal.* To hold, as did the Court of Appeals below, that

*The fact is, however, that Starzel, AP's General Manager and chief operating executive since 1948, could recall no instance where any other newspaper raised a question about receiving less than the basic three-wire service (R. 60a, 163a).

a willing buyer may take advantage of such assumed illegality so as to escape the consequences of his breach, years later, of a contract valid as between the parties is directly contrary to the decision of this Court in *Kelly* v. *Kosuga*, 358 U. S. 516. In so holding, the Court of Appeals has approved an antitrust defense which, at best, must be described as highly questionable, and has disregarded the admonition of Mr. Justice Brennan in *Kelly* v. *Kosuga*, *supra*, that "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court" (at p. 518).

The petitioner in *Kelly* had refused to accept and pay for all the onions he had contracted to buy from respondent. In defending an action for the unpaid part of the purchase price,* petitioner claimed that plaintiff-respondent had informed petitioner and other onion growers that unless they purchased a large amount of onions from respondent, the latter would deliver them on the futures exchange to depress the cash market price of onions. Petitioner further alleged that as part of his agreement to purchase onions, respondent, petitioner and other onion growers agreed that they would not deliver onions on the futures market.

Even though this Court assumed that these allegations charged a Sherman Act violation, it permitted recovery on the contract. Speaking for the Court, Mr. Justice Brennan stated (p. 521):

> "Accordingly, while the nondelivery agreement between the parties [to withhold onions from the futures market] could not be enforced by a court, if its unlawful character under the Sherman Act be assumed, it can hardly be said to enforce a violation

*Contrary to the Court of Appeals' implication (*infra*, pages 33a-34a), the action in *Kelly* was for the balance of the contract price for onions not received or used by the defendant (358 U. S. at p. 518). See also *Kosuga* v. *Kelly*, 7 Cir., 257 F. 2d 48, 50 (1958), *aff'd*, 358 U. S. 516.

> of the Act to give legal effect to a completed sale of onions at a fair price. And while analysis in terms of 'divisibility' or some other verbal formula may well be circular, see 6 Corbin, Contracts, § 1520, in any event, where, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question."

As in *Kelly,* there is no inherent vice here in Times-Star's contract to take AP's basic service and to pay a fair assessment. This contract equally "constitutes an intelligible economic transaction in itself. . . ." This is true even though it be assumed, as in *Kelly,* that there was an illegal tie-in.

Indeed, any assumed illegality in the instant case is far more remote from the contract sued upon than the assumed illegality in *Kelly.* Since, in *Kelly,* the total arrangement between the parties was assumed to be illegal in part, this Court was required to rule that the illegal portion of the arrangement could be disregarded when the part sought to be enforced was of itself an intelligible economic transaction. Here, as we have shown, no part of the 1948 agreement between the parties can in any sense be deemed illegal. Thus this Court need not consider whether it should sever an illegal portion of a total transaction from a legal portion. It need merely recognize, we respectfully suggest, that the assumed existence of an illegal tie-in policy does not taint or in any way affect the arrangement between AP and Times-Star, where a willing buyer agreed with a willing seller to purchase exactly what was offered. If the antitrust defense was of no avail in *Kelly,* where the illegality was part of the total agreement, *a fortiori,* it is of no avail to Times-Star.

3. The Decision of the Court of Appeals in the Instant Case Is Directly in Conflict with the Decision of This Court in *Times-Picayune* v. *United States*, 345 U. S. 594, and the Decision of the United States Court of Appeals for the First Circuit in *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F. 2d 653 (1961), *cert. den.*, 368 U. S. 931.

In *Times-Picayune* v. *United States*, 345 U. S. 594, a publisher owned both a morning newspaper, the Times-Picayune, and an evening newspaper, the States. Its policy required classified and general display advertisers to purchase combined insertions appearing in both the morning and evening papers. One of the grounds for holding that an illegal tie-in did not exist was stated by the Court in the following terms (p. 614):

> "The factual departure from the 'tying' cases then becomes manifest. The common core of the adjudicated unlawful tying arrangements is the *forced** purchase of a *second distinct commodity** with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market. Here, however, two newspapers under single ownership at the same place, time, and terms sell indistinguishable products to advertisers; no dominant 'tying' product exists (in fact, since space in neither the Times-Picayune nor the States can be bought alone, one may be viewed as 'tying' as the other); no leverage in one market excludes sellers in the second, because for present purposes the products are identical and the market the same."

So here, member-newspapers buy news from AP to obtain the fullest possible coverage—to prevent being

*Emphasis supplied.

"scooped". Times-Star, in 1957, sought a lesser service because of its "stringent cost reduction program" (D. Ex. 13, R. 451a). But for that, we submit, Times-Star's motivations would never have deviated from those expressed by its own assistant publisher, Mr. Rosemond, who testified, "We depended upon the Associated Press to get us any number of wires, whether it be three, four, five or six. We depended upon them to get the news to us as quickly as possible. If a big story is breaking and one wire is overloaded, we would depend upon them to get it to us or we might have expected to get scooped by another paper" (R. 110b-111b).

News is news, and AP's members, in paying their assessments, expect to receive promptly all spontaneous news of possible interest to their readers whether such news is sent over an A wire, a D wire or an S wire. Neither they nor AP can predict in advance what news, sent over what wire, will be of interest to newspapers readers. AP's aim, and undoubtedly that of its members, since they control AP, is to supply the members with all of the news promptly by whatever means seems most appropriate.

Indeed, the factors here, showing inseparability of the basic news service, are far more compelling than those in *Times-Picayune*. There, no practical considerations would appear to have precluded the sale of advertising space in either the morning or evening newspaper. Here, for example, furnishing Times-Star with the S wire service alone would have given it not only Ohio regional news, but considerable news gathered throughout the United States, and abroad, without adequate compensation. Since the volume and kind of news to be gathered throughout the world, which might be transmitted over the S wire, cannot be predicted, it would appear to be impossible to allocate a fair portion of AP's costs to any segment of its basic service. AP, a non-profit organization, must, in the

long run, recover its costs of operation. No more reasonable method has been suggested here than to assess its newspaper-members on the basis of population served by each member.

In *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 1 Cir., 292 F. 2d 653 (1961), *cert. den.*, 368 U. S. 931, the Court of Appeals for the First Circuit, in holding that an illegal tie-in did not exist, stated (p. 655):

> "We may agree with the plaintiff that the compulsory joining of two 'separate' articles is a per se violation of the act. This statement, however, solves nothing. Articles, though physically distinct, may be related through circumstances. The sound business interests of the seller or, phrasing it another way, a substantial hardship apart from the loss of the tie-in sale may be such a circumstance. It would not be thought, for example, that a one-legged man could insist on purchasing only a left shoe. Whatever may be meant by per se, we must first consider what may be fairly treated by a seller as inseparable."

A requirement that AP furnish one of an integral group of facilities to Times-Star would create a hardship on AP's remaining members who, because of the deficits incurred by AP, would be required to pay increased assessments were Times-Star or any other member permitted to bear less than its fair share of AP's total expense (R. 343a-344a, 21b-23b). As Judge O'Sullivan, dissenting, said, ". . . the obvious difficulty and perhaps impossibility of making any such cost division that would be reliable is, I believe, relevant to and supportive of the District Judge's finding of fact that appellant [Times-Star] failed to prove its case of separability and distinctness" (*infra*, page 44a).

In *Times-Picayune* v. *United States, supra,* Mr. Justice Clark emphasized the importance of the press to our democratic society. As he observed, "A vigorous and dauntless press is a chief source feeding the flow of democratic expression and controversy which maintains the institutions of a free society" (at p. 602). The decision below will, if followed, disturb and undermine AP's fundamental relationship with about 1,250 regular newspaper-members located throughout the United States. A ruling of such importance in the sensitive area of news should be carefully scrutinized by this Court.

CONCLUSION

For the reasons advanced above, the petition for a writ of certiorari should be granted.

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